

computing the awards for those injuries and impairments, Judge Barnes attributed the equivalent of 61.04 weeks of temporary total disability benefits paid in this claim to the left upper extremity injury. The Judge did not attribute any weeks of temporary total disability benefits to the right upper extremity injury. In addition, the Judge determined claimant's award for the left upper extremity injury was capped at \$50,000 for the \$53,471.39 (\$16,286.08 in temporary total disability benefits and \$37,185.31 in permanent partial disability benefits) that was otherwise due.

Claimant requests the Board to find that the Director of Workers Compensation exceeded the Director's authority in promulgating K.A.R. 51-7-8 as it conflicts with K.S.A. 44-510d and 44-510f(a)(4). Claimant requests the Board to calculate his permanent partial disability benefits for each upper extremity without deducting any weeks of temporary total disability benefits from the maximum number of weeks allowed for the injury. In the alternative, claimant requests that the weeks of temporary total disability benefits should be equally allocated between the left and right upper extremity injuries. Finally, claimant argues the Judge erred by capping the disability benefits awarded for the left upper extremity injury at \$50,000.

Respondent requests the Board to affirm the Award in all respects. Respondent contends that given the particular facts of claimant's injuries and the recent Kansas Court of Appeals' decision in *Mitchell v. PetSmart, Inc.*,¹ the Judge correctly computed the award.

The issues before the Board on this appeal are:

1. When computing claimant's permanent partial disability benefits under the schedule of K.S.A. 44-510d, are the weeks of temporary total disability benefits deducted from the maximum number of weeks of disability benefits set forth in the schedule?
2. If so, should the weeks of temporary total disability benefits in this instance be allocated equally between claimant's two scheduled injuries?
3. Did the Judge err by limiting claimant's award for the left upper extremity injury to \$50,000?

¹ *Mitchell v. PetSmart, Inc.*, ___ Kan. App. 2d ___, 203 P.3d 76, *pet. for review filed* (2009).

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant was injured on October 3, 2003, when his left upper extremity became caught in a belt press he was operating for respondent. In trying to remove his left upper extremity from the machine, claimant used his right upper extremity and both lower extremities as leverage. Claimant could not reach the safety switch, which was approximately four or five feet away. A co-worker shut the machine down and claimant was able to free his left upper extremity from the press.

Claimant's medical care included seven surgeries on his left hand and forearm within the first three and one-half weeks. An extensive period of rehabilitation followed. In addition, claimant underwent left carpal tunnel release and left ulnar nerve wrist decompression surgery in February 2004 and he also had an injection into his left elbow.

In addition to injuring his left upper extremity, claimant also injured his right upper extremity. When the accident occurred, claimant primarily felt the excruciating pain in his left upper extremity. But eventually, after coming off heavy pain medication, claimant began noticing more pain in his right upper extremity. Following the accident, claimant had burn marks on his right upper extremity from the press. What is more, he believes he injured his right upper extremity when he braced himself against the press and tried to pull his left hand from the machine. Treatment for claimant's right upper extremity was initially delayed but he eventually received an injection, had right shoulder arthroscopic surgery in March 2006, and received physical therapy.

Despite his injuries, claimant continued working for respondent under temporary restrictions until December 2006. As respondent either could not or would not accommodate claimant's permanent upper extremity restrictions, claimant was terminated. Since that time claimant worked somewhat more than a year driving a taxi for the railroad. And when he testified at the October 2008 regular hearing, claimant had been working part time for approximately seven months as a Sonic fry cook while continuing to look for other employment.

The parties agree with the Judge's findings of claimant's functional impairment. Accordingly, claimant is entitled to receive permanent partial disability benefits for an 85 percent impairment to the left upper extremity at the shoulder level and a five percent impairment to the right upper extremity at the shoulder level.

CONCLUSIONS OF LAW

Temporary total disability benefits and computing claimant's awards

Claimant's injuries are listed in the schedule of K.S.A. 44-510d; consequently, that statute controls the computation of claimant's permanent disability benefits. When determining the number of weeks of permanent disability benefits claimant was entitled to receive for the left upper extremity injury, the Judge deducted the number of weeks of temporary total disability benefits that claimant was paid, 61.04, from the maximum weeks of benefits on the schedule for an injury to an upper extremity at the shoulder level, 225. The Judge did not deduct any weeks of temporary total disability benefits from the award for the right upper extremity injury.

The schedule of K.S.A. 44-510d provides that a worker is entitled to no more than 225 weeks of permanent disability benefits for the loss of an arm including the shoulder. But that statute does not address how temporary total disability benefits figure into the computation. Indeed, the Workers Compensation Act is silent regarding that detail. Consequently, K.A.R. 51-7-8 was adopted and it provides:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

(2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.

(b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.

(1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:

(A) deduct the number of weeks of temporary total compensation from the schedule;

(B) multiply the difference by the percent of loss or use to the member; and

(C) multiply the result by the applicable weekly temporary total compensation rate.

(2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:

(A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;

(B) deduct the temporary total compensation; and

(C) multiply the remainder by the weekly temporary total compensation rate.

(3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks

on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

(c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

(3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

(5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

In short, the regulation requires that claimant's weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due claimant.

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.²

² K.S.A. 44-573.

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.³

“Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law.” *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, Syl. ¶ 1, 673 P.2d 1126 (1983).⁴

Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.⁵

Consequently, claimant’s award of permanent partial disability benefits must be computed after reducing the maximum 225 weeks by the temporary total disability weeks.⁶

Claimant’s request to divide the temporary total disability benefits equally between the left upper extremity and right upper extremity injuries should be denied. The parties represented at oral argument that the temporary total disability paid was during the extensive treatment claimant received for his left upper extremity injury. The regulation quoted above states “temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.”⁷ Consequently, in computing permanent partial disability benefits for scheduled injuries the temporary total disability weeks are allocated to the injury that prevented claimant from working. And, in this instance, the parties represented, and the record supports, that was the left upper extremity injury.

In conclusion, the Judge did not err in the manner she considered claimant’s temporary total disability benefits in computing claimant’s awards.

³ See K.S.A. 77-425; *Harder v. Kansas Comm’n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988).

⁴ *State v. Pierce*, 246 Kan. 183, 189, 787 P.2d 1189 (1990).

⁵ *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 2, 763 P.2d 317 (1988).

⁶ See also *Cowan v. Josten’s American Yearbook Co.*, 8 Kan. App. 2d 423, 427, 660 P.2d 78, rev. denied 233 Kan. 1091 (1983); *Rhea v. Kansas City Power & Light Co.*, 176 Kan. 674, 678, 272 P.2d 741 (1954).

⁷ K.A.R. 51-7-8(a)(1).

Capping claimant's left upper extremity award

The Workers Compensation Act states that awards of *permanent partial disability* are capped at \$50,000 when based upon functional impairment only. The Act provides:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.⁸

As indicated in the Award, the Judge determined claimant was entitled to receive \$16,286.08 in temporary total disability benefits and \$37,185.31 in permanent partial disability benefits for his left upper extremity injury; subject, however, to a \$50,000 cap.

The Board concludes the \$50,000 cap in K.S.A. 44-510f(a)(4) only pertains to an award of permanent partial disability benefits. The \$50,000 maximum does not include temporary total disability benefits.⁹ And because the \$37,185.31 in permanent partial disability benefits does not exceed \$50,000, the cap clearly does not apply. Consequently, the award for claimant's left upper extremity injury should be modified. Claimant is entitled to receive temporary total disability benefits in the sum of \$16,286.08 and permanent partial disability benefits in the sum of \$37,185.31 for a total award of \$53,471.39 for his left upper extremity injury.

In conclusion, the award for claimant's left upper extremity injury should be modified but the award for the right upper extremity injury should be affirmed.

⁸ K.S.A. 44-510f.

⁹ See *Wohler v. Allen Millwork Company*, No. 241,120, 2001 WL 1399446 (Kan. WCAB Oct. 31, 2001); *Matin v. Outside Connections, Inc.*, No. 236,835, 2000 WL 1134440 (Kan. WCAB July 28, 2000).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the February 5, 2009, Award entered by Judge Barnes is affirmed in part, reversed in part, and modified as follows:

Left Arm

Steven M. Foiles is granted compensation from Legg Company, Inc., and its insurance carrier Republic Indemnity Company for an October 3, 2003, accident and resulting disability. Based upon an average weekly wage of \$400.20, Mr. Foiles is entitled to receive 61.04 weeks of temporary total disability benefits at \$266.81 per week, or \$16,286.08, plus 139.37 weeks of permanent partial disability benefits at \$266.81 per week, or \$37,185.31, for an 85 percent permanent partial disability to the left arm including the shoulder, making a total award of \$53,471.39, which is all due and owing less any amounts previously paid.

Right Arm

Steven M. Foiles is granted compensation from Legg Company, Inc., and its insurance carrier Republic Indemnity Company for an October 3, 2003, accident and resulting disability. Based upon an average weekly wage of \$400.20, Mr. Foiles is entitled to receive 11.25 weeks of permanent partial disability benefits at \$266.81 per week, or \$3,001.61, for a five percent permanent partial disability to the right arm including the shoulder, making a total award of \$3,001.61, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

¹⁰ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of June, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and Republic Indemnity Company
John M. Graham, Jr., Attorney for Respondent and Liberty Mutual¹¹
Nelsonna Potts Barnes, Administrative Law Judge

¹¹ On behalf of respondent and Republic Indemnity Company, Mr. Brewer implied Liberty Mutual into this claim. Mr. Graham has not withdrawn nor has Liberty Mutual been dismissed from this claim.